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80-6375

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Supreme Court, U.S.
FILED
MAR 20 1981
Alexander L. Stevas, Clerk

VAN ROOSEVELT SOLOMON,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the jury's reliance upon the statutory language of Ga. Code Ann. § 27-2534.1(b)(7) to impose a sentence of death -- absent any jury instruction by the trial court properly limiting that aggravating circumstance -- violates the Eighth and Fourteenth Amendments?

2. Whether the imposition of a death sentence upon petitioner absent a finding by the jury that petitioner himself has taken life, attempted to take life, or intended to take life, violates the Eighth and Fourteenth Amendments?

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STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

Petitioner Van Roosevelt Solomon prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is not yet officially reported. A copy of the slip opinion is annexed hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on November 14, 1980. A timely petition for rehearing was denied on January 19, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

This case also involves Ga. Code Ann. §27-2534.1(b)(7), which provides in relevant part:

> "[T]he judge shall . . . include in his instructions to the jury for it to consider, . . . any of the following statutory aggravating circumstances which may be supported by the evidence: (7) The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

STATEMENT OF THE CASE

Petitioner Van Roosevelt Solomon was convicted and sentenced to death on September 27, 1979, in the Superior Court of Cobb County, Georgia, for the murder of Roger Tackett.

During petitioner's trial, the State presented evidence which indicated that Roger Tackett, the victim, was the manager of a combination service station and convenience store in Cobb County. On the night of June 16, 1979, Mr. Tackett arrived at the store at 11:20 p.m. and assisted the two night shift employees in preparing to close. The store was closed at midnight, and the two employees left the scene at

12:30 a.m. Mr. Tackett remained at the store in order to do some paper work.

At 1:50 a.m., Officer Ray Kendle of the Cobb County Police Department drove into the Tenneco store parking lot (T. 239-40). He noticed an unattended green Dodge automobile parked adjacent to the store with the front door open on the driver's side (T. 241). Officer Kendle left his patrol car to investigate and, as he approached the store, he noticed a black male, later identified as Wilbur May, open a back storeroom door inside the store, look out, and then close the door (T. 242). Officer Kendle entered the store through the unlocked front door, and as he walked inside, heard three "pops" in rapid succession, a pause, and then another "pop" (T. 243).

He drew his weapon, announced his presence, and ordered whoever was in the storeroom to surrender. Opening the storeroom door, Officer Kendle observed two black males, Wilbur May and the petitioner, standing near a walk-in cooler (T.244-45). Officer Kendle placed both men under arrest and brought them, one at a time, to the patrol car (T. 246). A private security guard, Alex Woolard, and back-up units of the Cobb County Police Department soon arrived to help effectuate the arrests and to investigate the scene (T. 247-49).

Officer Kendle then instructed a police radio operator to call the manager of Tenneco station at a number posted on a nearby door. He was informed that the manager, Mr. Tackett, was believed to be at the store at that time (T.248). Officer Kendle and Mr. Woolard then proceeded to the back of the store, forced open the back door, and discovered Roger Tackett lying on the floor, mortally wounded (T. 249-50).

Two guns were subsequently found in a cardboard box which was located near the body. Testimony presented at the trial identified one of the guns as a Colt .38 short revolver which had four spent rounds in the chambers. The other gun was identified as a Smith and Wesson .38 which had two spent rounds (T. 341-42; 355-56). Petitioner testified during the sentencing hearing that he was the owner of the Smith and Wesson (T. 598). The State presented no contrary evidence.

During the trial the State presented expert testimony from medical examiner Dr. Joseph Burton to establish the nature of the injuries sustained by Roger Tackett and Dr. Burton's opinion regarding the probable sequence of those injuries. Dr. Burton testified that Mr. Tackett had sustained abrasions to the left forehead and right knee, as well as five separate bullet wounds -- one wound to the left thumb, two wounds to the right hip, one wound on the left cheek, and one wound located behind the left ear (T. 455-56).

Dr. Burton was unable to testify as to when the abrasions and the thumb wound were sustained (T. 475, 484). He did testify that the other four bullet wounds were inflicted in rapid succession (T. 471-74) with the final shot, the one behind the ear, rendering the victim instantaneously unconscious (T. 473).

The State also presented the expert testimony of Kelly Fite in order to identify the weapons and the four bullets which had been recovered from the scene. Mr. Fite identified

each bullet, two of which were found in the backroom and two of which were recovered from the victim's body, as having been fired from the Colt revolver (T. 432).

During closing argument, counsel for petitioner contended that the evidence demonstrated that petitioner was coerced by Wilbur May into participation in the crimes but that he had not fired the fatal shots (T. 518-23). The State argued to the jury that

> "where one party [does] a particular act and another can be aiding and abetting or helping him in some way . . . under the law, as it should be, that person is just as guilty as if he pulled the trigger. So, when you are talking about Wilbur May or Van Solomon, you don't have to, if you apply the facts of this case, concern yourselves with who did what at what particular point in time, where they are both in the building, both guns are fired, they caused the death of Roger Tackett, they are both guilty of murder. (T. 531).
>
> * * *
>
> It doesn't matter, ladies and gentlemen, which gun caused the death, who did the firing. We don't know. We have to hypothecate [sic]. But it is not necessary to prove the bill of indictment -- both parties are guilty of the crime -- you are only concerned with Van Solomon. There is no question of his guilt." (T. 540-41). 1/

1/ The State also contended that because the victim sustained five bullet wounds, while only four spent cartridges were found in the Colt .38, both weapons had to have been fired. (T. 533-34).

During its charge at the guilt or innocence phase, the trial court instructed petitioner's jury that a "person is concerned in the commission of a crime . . . if he (1) directly commits the crime,(2) intentionally aids or abets in the commission of the crime, or (3) intentionally advises, encourages, hires, counsels or procures another to commit the crime," (T. 556), although the court also explained that "mere presence alone at the time of the perpetration of any such crime would not alone be sufficient to convict the Defendant of any crime" (T. 557).

The court further charged the jury on conspiracy:

> "If a conspiracy is established beyond a reasonable doubt, then any act done by any of the parties pursuant to such an agreement is, in the contemplation of the law, the act of each of them and they are jointly responsible therefor. This means that everything done by any of the conspirators in accomplishing or furtherance of the common purpose is deemed to have been done by each of them." (T. 562).

The jury found petitioner guilty of murder without specifying whether it relied on an aider and abettor or a conspiracy theory (T. 569).

During the sentencing phase, the State alleged two aggravating circumstances: that the murder was committed during the course of an armed robbery (Ga. Code Ann. §27-2534.1(b)(2)); and that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim." (Ga. Code Ann. §27-2534.1(b)(7))(T. 574).

In its charge to the jury, the court simply read the statutory language of the (b)(7) aggravating circumstance without any limitation, explanation or clarification (T. 651), and the jury returned a verdict recommending death on the basis of both the (b)(7) and the (b)(4) circumstances. (T. 656).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. In his Brief of Appellant, filed May 21, 1980, in the Supreme Court of Georgia, petitioner argued as his fifth enumeration of error that Ga. Code Ann. §27-2534.1(b)(7) "is violative of the Eighth and Fourteenth Amendments to the Constitution," Brief, at 26,"because it failed to provide 'objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.' Woodson v. North Carolina, 428 U.S. 280, 303 (1976)." Brief, at 27. Petitioner also contended that "[s]ection (b)(7) is . . . void for vagueness under the traditional due process standards of the Fourteenth Amendment." Brief, at 28.

In a Supplemental Brief of Appellant, filed on July 15, 1980, petitioner argued that "the judge's charge concerning [Ga. Code Ann.] 27-2534.1(b)(7), without any restrictive instructions to channel the sentencer's discretion by clear and objective standards, amounted to a denial of the Appellant's rights under the Eighth and Fourteenth Amendments to the Constitution of the United States." Supplemental Brief, at 2. Citing Godfrey v. Georgia, 446 U.S. 420 (1980) on the

need for a limiting instruction to require "evidence of serious physical abuse of the victim before death," id., petitioner contended that "[t]here was no serious physical abuse before death, but rather any physical abuse occurred instantaneously, as evidenced by the police officer's description of the gunshots." Id. at 6.

In its opinion affirming petitioner's conviction and sentence of death, the Supreme Court of Georgia rejected petitioner's claim, holding that "[t]his enumeration is without merit. Gregg v. Georgia, 428 U.S. 153." Solomon v. State, slip opinion, at 8.

The Georgia Court discussed the facts of the crime, suggesting that it was possible that the victim was shot in the thumb during the robbery to force him to reveal the whereabouts of the money, slip opinion, 10-11, and concluded that "[w]hile the trial court did not give a limited charge on §27-2534.1(b)(7), we noted that a limited charge was not required under the facts of this case," slip opinion, at 12.

2. Petitioner did not directly raise the second question presented here to the court below. However, pursuant to Ga. Code Ann. §27-2537(c)(3), the Supreme Court of Georgia has an independent statutory obligation in each capital case to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." The Georgia Supreme Court held in this case that petitioner's sentence was "not excessive or disproportionate," slip opinion, at 12.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE JURY'S RELIANCE UPON THE STATUTORY LANGUAGE OF GA. CODE ANN. § 27-2534.1(b)(7) TO IMPOSE A SENTENCE OF DEATH -- ABSENT ANY JURY INSTRUCTION BY THE TRIAL COURT PROPERLY LIMITING THAT AGGRAVATING CIRCUMSTANCE -- VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

This case presents the question of whether a death sentence based in part on a jury finding of Ga. Code Ann. § 27-2534.1(b)(7) -- the "(b)(7) aggravating circumstance" -- is constitutional, absent any limiting instruction given to the trial jury on the proper construction of §(b)(7). In Godfrey v. Georgia, 446 U.S. 420 (1980), the Court held that a capital statute is applied in a constitutional fashion only if it "channel[s] the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process of imposing a sentence of death.'" 446 U.S. at 428. The Court observed that "[t]here is nothing in [the] words [of Ga. Code Ann. §27-2534.1(b)(7)] standing alone that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence," and found that "the trial judge's sentencing instructions," in Godfrey -- virtually identical to the instructions given in petitioner's case -- "gave the jury no guidance concerning any of §(b)(7)'s terms," id. at 429. "To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to

any murder . . . would effectively grant it unbridled discretion to impose the death penalty." Godfrey v. Georgia, supra, 446 U.S. at 437 (Marshall, J., concurring in judgment).

Moreover, the failure to carefully instruct the jury was especially harmful in this case, in which it is unlikely that a reasonable jury, properly instructed on the law, would have found §(b)(7) present. The facts presented here, although tragic, do not constitute a case within the "core" of (b)(7). The State did attempt to concoct a theory to suggest that the victim had been "tortured," speculating that the bullet wound to victim's thumb and the abrasions on his forehead had been deliberately inflicted by petitioner to force disclosure of the source of hidden funds. Yet no evidence was presented to support this bizarre story, apart from the testimony of the medical examiner, who acknowledged that he could not say precisely when or where these injuries occurred. (T.475). Moreover, no clear evidence existed to show that petitioner, rather than his co-defendant, inflicted this injury to the victim's thumb, nor even that it had been inflicted intentionally.

Petitioner himself testified that the wound to the thumb occurred simultaneously with the other wounds, all of which had been inflicted by the co-defendant May:

> "While I was back there in the back room when Mr. May was shooting Mr. Tackett when I turned around and looked at what was going on, Mr. Tackett had put his hand up by his head, and by this time Mr. May shot again and I guess the bullet hit his thumb, and probably hit him again." (T. 619, 620).

The other four bullet wounds, according to the State's own witnesses, were sustained in rapid succession (T. 243, 475), instantaneously rendering the victim unconscious (T. 473).

Absent a proper limiting instruction, neither the Supreme Court of Georgia nor this Court can do more than speculate on whether petitioner's jury accepted the State's extraordinary interpretation of the facts, or whether, instead, the jury simply concluded that "almost every murder [is] 'outrageously or wantonly vile, horrible and inhuman,'" Godfrey v. Georgia, supra, 446 U.S. at 429, and imposed a death sentence on that basis.

In order to eliminate the inevitable ambiguity and uncertainty which will otherwise accompany capital sentencing decisions under this aggravating circumstance, the Court should grant certiorari to determine whether the Eighth and Fourteenth Amendments require that Georgia juries be uniformly instructed on the proper, limited construction of §(b)(7). Alternatively, the Court should grant certiorari and vacate petitioner's death sentence, remanding the case to the Supreme Court of Georgia for reconsideration in light of Godfrey v. Georgia, supra.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE INFLICTION OF THE DEATH PENALTY UPON PETITIONER ABSENT A FINDING BY THE JURY THAT PETITIONER HIMSELF HAS TAKEN LIFE, ATTEMPTED TO TAKE LIFE, OR INTENDED TO TAKE LIFE, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

This case presents a question expressly reserved by the Court in Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978): whether a sentence of death may constitutionally be imposed upon an offender absent a jury finding that the offender himself took life or intended to take life.

The logic of this Court's prior decisions strongly suggests that the Eighth and Fourteenth Amendments preclude the imposition of the unique and extreme penalty of death upon one who has not taken life or intended the death of the victim. The Court has held that the penalty of death is not per se excessive or disproportionate where "a life has been taken deliberately by the offender," Gregg v. Georgia, 428 U.S. 153, 187 (1976), but that it "is an excesssive penalty for the rapist who, as such, does not take human life," Coker v. Georgia, 433 U.S. 584, 598 (1977). The principle of these holdings appears to be that it is disproportionate and hence constitutionally impermissible for a State to extinguish the life of an offender who has not deliberately extinguished the life of any victim. One member of the Court has explicitly reached this conclusion, Lockett v. Ohio, supra, 438 U.S. at 627-28 (White, J., concurring), but the full Court has thus far refrained from deciding the issue.

The application of recognized Eighth Amendment criteria for gauging the proportionality of punishments supports Justice White's conclusion in Lockett. The Court has indicated that an appropriate method to determine whether a sentence is unconstitutionally disproportionate or excessive is whether it comports with the "evolving standards of decency" reflected in contemporary community judgments on the propriety of a particular sentence. Coker v. Georgia, supra, 433 U.S. at 592; Gregg v. Georgia, supra, 428 U.S. at 173. The petitioner in Lockett presented a study of all executions for homicide since 1954 for which facts were available. Lockett v. Ohio, supra, Brief for Petitioner, at 66 and App. B; 438 U.S. at 624-25 & n.6 (White, J., concurring). That study indicated that "only eight [out of 363] clearly involved individuals who did not personally commit the murder." Lockett, supra, 438 U.S. at 624 (White, J., concurring). Two of those eight had hired others to do the killing. Id. at 625 n.7. Since that study was conducted in 1977-78, three additional persons have been executed; all had personally killed their victims. 2/

2/ John Spinkellink was executed on May 25, 1979. The facts of his case are reported in Spinkellink v. State, 313 So.2d 666 (Fla. 1975). Jesse Bishop was executed on October 22, 1979. The facts of his case are reported in Bishop v. State, 597 P.2d 273 (Nev. 1979). Stephen Judy was executed on March 9, 1981. The facts of his case are reported in Judy v. State, __Ind. __, 416 N.E.2d 95 (Jan. 30, 1981).

The statistics contained in the Lockett study concerning the State of Georgia further demonstrate the community judgment that a person who has not himself killed should not be put to death. Of the 36 persons executed for homicide in Georgia since 1954, not a single person was executed who had not personally caused the death of the victim. Indeed, the Supreme Court of Georgia concluded in one case that it was excessive to impose a sentence of death upon a defendant who was not the triggerman or "'prime mover' in the crime," at least in circumstances in which the actual triggerman received a sentence less than death. Hall v. State, 241 Ga. 252, 259-60, 244 S.E.2d 833, 839 (1978).[3/]

Petitioner has been sentenced to die not only without an express finding "that [he] . . . engaged in conduct with the conscious purpose of producing death," Lockett v. Ohio, supra, 438 U.S. at 628 (White, J., concurring), but upon a record which would make such a finding by a properly instructed jury implausible. Moreover, petitioner was sentenced following

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3/ The Georgia Supreme Court affirmed the imposition of a death sentence upon a non-triggerman in Hill v. State, 237 Ga. 794, 229 S.E.2d 737 (1976), but only on the ground that the defendant "was the prime mover in this murder beginning with his breaking down of the victim's door and continuing through the beating of the victim and his attempts to stab the victim and signalling for the victim's death." Id. at 803, 229 S.E.2d at 743. Hill's death sentence was subsequently commuted. See Georgia State Board of Pardons and Paroles, Commutation Proceedings, in State v. Hill, opinion of September 28, 1977.

conviction pursuant to instructions which permitted a guilty verdict if the jury merely found that petitioner had participated as a conspirator in a robbery, and that his co-conspirator had murdered the victim "in accomplishing or furtherance of the common purpose."

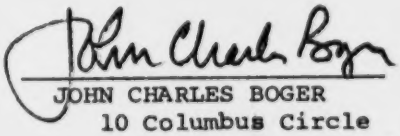
Before petitioner's sentence is carried out, the Court should grant certiorari to resolve the question whether a death sentence imposed without a jury finding of intent to kill is excessive or disproportionate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 20, 1981

Respectfully submitted,



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APPENDIX A

4.5

In the Supreme Court of Georgia Decided: NOV 14 1980

36363. SOLOMON v. THE STATE.

UNDERCOFLER, Chief Justice.

Van Roosevelt Solomon appeals from the sentence of death imposed on September 27, 1979, following his conviction for the murder of Roger Dennis Tackett committed on June 17, 1979, in Cobb County, Georgia. Following conviction, the jury found the following aggravating circumstances; that the offense of murder was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim; and that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery.

The State presented evidence authorizing the jury to find the following facts: The victim, Roger Dennis Tackett, was the manager of a Tenneco self-service gasoline station. Two employees, Linda Rosenfield and Carol Menfee, were working the evening shift and realized that they did not have the keys to lock the station when it closed at midnight. One employee talked to the victim by phone who then came into the station at 11:20 p.m. in order to lock the store after closing. After the station closed, the two employees left and the victim locked the station but remained to catch up on some paper work in order that he could be with his family the next day, which was Father's Day. At approximately 1:00 a.m., Linda Rosenfield drove by the Tenneco

station and noticed the victim's car still parked in front of the store.

Early in the evening on the 16th of June, Jill Cindy Rhoda picked up her dinner date at an apartment complex located near the Tenneco station. She drove her date back to his apartment at approximately 12:30 a.m. They argued and her date took her car keys and went to his apartment. Ms. Rhoda contacted the police in order to get her keys back. Officer Kendle of the Cobb County Police Department accompanied her to the apartment complex, but she could not find her boyfriend's apartment. She did, however, remember his phone number. At approximately 1:50 a.m., the officer drove her to the Tenneco station in order to call and find out where the apartment was. When they arrived at the station, Ms. Rhoda went to use the pay phone. Officer Kendle noticed an unattended green Dodge automobile parked in front of the station with its door open and a loaf of bread in the front seat. As he went to investigate, he noticed a black male, later identified as Wilbur May, open the back storeroom door inside the station, quickly look out and then close the door. He found the front door of the station to be unlocked, drew his weapon, and proceeded inside. As he walked through the store, he heard three closely spaced shots, a pause, and then another shot. The officer ordered the person in the storeroom to come out but did not get a response. He opened the door and standing near a walk-in cooler were two black males, Wilbur May and the appellant. He placed both persons under arrest and asked what they were doing there. The defendant said that "they were burglarizing." The officer handcuffed May, however, the officer was unable to cuff the appellant as he only had one pair of cuffs. The appellant was taken to the officer's patrol car and secured in the back seat. Wilbur May was then taken out of the store and was placed spread-eagle on the hood of the officer's patrol car.

The officer then advised both the appellant and his co-defendant of their Miranda rights. A private security guard in the area who had heard the call for backup units arrived at the Tenneco station and helped to effectuate the arrest. Later, other units of the Cobb County Police Department arrived. Officer Kendle then had the police radio operator call the emergency number listed on the door of the Tenneco station. He learned that the victim was supposed to be in the store at the time. The officer and the security guard then broke into the back of the store using a crowbar. When they entered, they found the victim's body. He had been beaten and shot five times. There was a time interval of approximately twenty to thirty-five minutes between the arrest and the discovery of the victim's body. Near the body the officers found two guns, one of which still had the hammer cocked. One of the guns, a Colt .38 short revolver, had four spent rounds in the chambers. The other, a Smith & Wesson .38, had one spent round. Also, discovered near the scene, well hidden in underbrush, was a van that the appellant and his co-defendant were driving. It contained a large number of tools.

The appellant at the time of his arrest was wearing brown cotton gloves. As he was transported to the jail, he hid them in the patrol vehicle but they were later retrieved by the officer.

The appellant later gave a statement in which he said that he and Wilbur May had been driving around, and he wanted to show Mr. May the Atlanta area. He said that he did not know how the van got to the Tenneco station, because he was tied up in the back of the van by Mr. May. He stated that Mr. May untied him and made him go into the Tenneco station and put him into the cooler. He did not hear any sounds nor did he remember having gloves on.

Both the appellant and his co-defendant were subjected to neutron activation tests, and both were determined to have recently fired weapons.

ENUMERATIONS OF ERROR

1. In his first enumeration of error, the appellant contends that his retained trial counsel failed to render reasonably effective assistance in the trial of his case. Appellant advances eight acts or omissions which he contends illustrate ineffective assistance of counsel. This court concludes after careful review of the record that the alleged acts or omissions did not constitute ineffective assistance of counsel. Jones v. State, 243 Ga. 820 (256 SE2d 907) (1979).

While other counsel, had they represented appellant, may have exercised different judgment, the fact that the trial counsel chose to try the case in the manner in which it was tried and made certain difficult decisions regarding the defense tactics to be employed with which appellant and his present counsel now disagree, does not require a finding that the representation below was so inadequate as to amount to a denial of effective assistance of counsel. Estes v. Perkins, 225 Ga. 268 (167 SE2d 588) (1969).

It is apparent from the record that the defense counsel was familiar with the facts of appellant's case and that he filed numerous pre-trial motions and argued them vigorously. At trial, he conducted an extensive voir dire examination, cross examined witnesses and argued in defense of his client. He objected during trial and presented evidence in mitigation during the sentencing phase. See Lewis v. State, 246 Ga. 101 (268 SE2d 915) (1980).

Appellant argues that trial counsel should have objected to the introduction of prior convictions during the pre-sentence

hearing. He contends that one of these convictions was rendered when the appellant was fifteen years old, and therefore, a juvenile. He also argues that the Oklahoma statute defining males as juveniles until the age of sixteen and females as juveniles until the age of eighteen was declared to be in violation of the equal protection clause of the United States Constitution. Therefore, the convictions were invalid. However, in Case No. C960, assault with a deadly weapon, the sentence plainly showed that the appellant was represented by counsel and was tried as an adult. In Case No. C1053, the appellant was tried also as an adult and was age seventeen. He was represented by counsel in that case. The same is true in Case No. C1118, armed robbery. Furthermore, the records were properly authenticated in that the prior convictions were proved by the records of the Oklahoma Department of Corrections and such records bore the attestation of the custodian and of the Secretary of State. Code Ann. § 38-630; see Smith v. Hart, 243 Ga. 59 (252 SE2d 470) (1979). The fact that the records of the Department of Corrections of Oklahoma contained multiple photographs commonly known as mug shots of the appellant was not grounds to exclude them. The records of prior convictions being admissible, it follows that appellant's retained counsel was not ineffective for failing to object to them. Appellant contends that his retained counsel should have voir dired prospective jurors on racial prejudice in that the county in which he was being tried was predominantly white while the appellant was a black man. Furthermore, appellant asserts that counsel should have stricken a juror who stated on voir dire that he heard privileged information as to the case but that he could not remember it. Trial counsel extensively voir dired prospective jurors and the range of voir dire examination and the use of preemptory strikes are matters that address themselves to trial tactics. Trial counsel submitted to the

court a pre-evidentiary charge which instructed the jury that opening statements were to assist the jury in understanding the evidence but that such statements were not evidence and were not to be considered evidence unless they were found to be supported by the evidence. See Sears v. Smith, 221 Ga. 47 (6) (142 SE2d 924) (1965). The trial court in its charge at the close of the guilt-innocence phase of the trial charged as to the weight to be given argument of counsel. The pre-evidentiary charge when considered as a whole was favorable to the defendant, and it is apparent that trial counsel benefited his client by submitting the same to the court.

Although it is noted herein that the trial counsel filed numerous pre-trial motions, he did not move to suppress evidence obtained from the search of appellant's van. After the arrest, local authorities impounded appellant's van and inventoried it at approximately 8:00 that morning. The items in the van were photographed and logged on an inventory property sheet and were secured in the property room. The items recovered from the van were numerous tools, two holsters, a brief case containing cartridges, a tract of the Black Christian Nationalist Church, a Bible dictionary and other papers. These items were introduced in evidence; however, had these items been suppressed, the State under the evidence in this case would still have proven each and every essential allegation of the crime alleged. Furthermore, under the evidence of this case, the search of appellant's van was a lawful inventory search and a motion to suppress would not lie. See Mooney v. State, 243 Ga. 373 (254 SE2d 337) (1979). In addition, certain items were in the van which were favorable to the defense and trial counsel insisted upon their introduction.

It is apparent that counsel was faced with overwhelming evidence of guilt. He vigorously represented his client and sought in every manner to avoid the death penalty. As noted in

Pitts v. Glass, 231 Ga. 638 (203 SE2d 515) (1974), effective counsel does not mean "errorless counsel and not counsel judged ineffective by hindsight but counsel reasonably likely to render and rendering reasonably effective assistance."

2. After his arrest, appellant was put inside the patrol car which had the front window rolled down. Wilbur May, his co-defendant, was handcuffed and was at the front of the patrol car. After the victim's body was discovered in back of the store, the private security guard asked the co-defendant where the guns were. He responded, "I can show you where they are at." Appellant's counsel objected on the grounds of hearsay and now assigns error to the admission of the statement. We find no merit in this contention. The statement of the co-defendant May was part of the narrative of a course of events. It did not have the effect of being probative on the guilt or innocence of the defendant. Crowder v. State, 237 Ga. 141 (227 SE2d 230) (1976), cited by appellant, is not applicable in that the statement of May was not a confession nor did he identify other conspirators or describe their participation. Furthermore, the record shows that the appellant was in a position to hear this statement of his co-defendant. The appellant's second enumeration of error is without merit. Moore v. State, 240 Ga. 210 (240 SE2d 68) (1977).

3. The statement of the appellant given subsequent to his arrest to the effect that he was coerced and forced to enter the Tenneco service station by Wilbur May was introduced during trial. Appellant's counsel requested a charge on duress even though his client did not testify. The trial court out of an abundance of caution, in that the statement raised the defense of duress, gave the requested charge. Error cannot now be enumerated upon the giving of the charge requested by defendant's counsel. Patterson v. State, 233 Ga. 724 (213 SE2d 612) (1975).

4. In his fifth enumeration of error, the appellant contends that Code Ann. § 27-2534.1(b)(7) is unconstitutionally vague. This enumeration is without merit. Gregg v. Georgia, 428 U. S. 153 (96 SC 2907, 2971; 49 LE2d 859) (1976); Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980); Cape v. State, Ga. (SE2d) (Case No. 36298; decided October 2, 1980).

5. In his sixth enumeration of error, the appellant contends that the court erred in admitting the testimony of the victim's wife and that the testimony was cumulative and not relevant to the issues at trial. The appellant argues that the testimony of Mrs. Tackett was elicited for the sole purpose of playing on the sympathy and prejudice of the jury. The trial court limited the testimony of Mrs. Tackett upon objection by defense counsel to the employment of her husband, the reason that he was at the store at the time of the robbery, and the phone call from the Cobb County Police Department. The witness was asked the usual preliminary questions as to marriage, children, and employment. We do not find such preliminary questions to be prejudicial. The remainder of her testimony was relevant to the issues at trial. Relevant testimony is admissible even though cumulative. Sprouse v. State, 242 Ga. 831 (252 SE2d 173) (1979).

6. There is no merit in appellant's contention that armed robbery is no longer a capital felony for the purpose of applying the aggravating circumstance provision of Code Ann. § 27-2534.1 (b)(2). Peek v. State, 239 Ga. 422 (238 SE2d 12) (1977); Davis v. State, 241 Ga. 376 (247 SE2d 45) (1978).

7. In his eighth enumeration of error, the appellant contends that the use of prior convictions in the sentencing phase of the trial as provided by Code Ann. § 23-2503, amounted to an ex post facto application of law. Appellant argues that since his prior convictions occurred before the enactment of

Code Ann. § 27-2503 that he was deprived of a substantial right. This argument has been raised before and decided adversely to the appellant. Todd v. State, 228 Ga. 746 (187 SE2d 831) (1972). See Fowler v. State, 235 Ga. 535 (221 SE2d 9) (1975).

8. Appellant's ninth and tenth enumerations of error more properly concern themselves with sentence review and will be addressed in that portion of this opinion.

SENTENCE REVIEW

In our sentence review, we have considered the aggravating circumstances found by the jury and the evidence concerning the crime and the defendant. We have reviewed the sentence as required by Ga. L. 1973, p. 159 et. seq. (Code Ann. § 27-2537 (c)(1-3) as we have in each case involving the death penalty under this statute. We find that the evidence factually substantiates the verdict and supports the finding of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781; 6 LE2d 560) (1979).

9. Appellant asserts that the sentence of death was imposed under the influence of passion, prejudice and other arbitrary factors because of the cumulative effect of incompetent, inadmissible evidence submitted by the State. He also argues that the jury was impassioned because of the introduction into evidence of the tract of the Black Christian Nationalist Church. After a complete review of the transcript and record of this case as mandated by our statute, we do not agree. The evidence submitted by the State being found admissible, the appellant's enumeration has no merit. The tract of the Black Christian Nationalist Church was contained in the brief case which belonged to appellant and which was found in the van. It was introduced into evidence during the guilt-innocence phase of the trial without objection. Appellant's religious affiliations were

introduced in mitigation during the sentencing phase of the trial. The record does not contain any indication that the jury did not follow its oath. In fact, the finding of the aggravating circumstances set forth below was a logical and rational result based upon the nature of the crime. We find that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

10. The jury found the following aggravating circumstances:

(a) "The offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery." Code Ann. § 27-2534.1(b)(2), and

(b) "The offense of murder was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim." Code Ann. § 27-2534.1 (b)(7).

Under the evidence in this case, the appellant and his co-defendant sought to rob the victim at gun point. The proceeds of the store were found in close proximity to where the appellant and his co-defendant were arrested. While the appellant denied participation in the crime in his testimony during the sentencing phase of the trial, the appellant stated that Mr. May asked "the victim where the money was," the victim said "there is no money," and "a shot or two was fired." The victim then told Mr. May where the money was. The co-defendant then got the tray with the money and got a plastic bag for it. Medical testimony established that the victim had been struck in the face, shot three times, twice in the hip, once in the face and then while lying helpless on the ground, shot in the back of the head. A fifth bullet wound was observed in the victim's thumb. When the arresting officer arrived on the scene, he heard three quick shots, a pause, and a fourth. He did not hear the first

shot, because he arrived after the victim was forced to tell where the money was. Under the facts of this case, the victim was subjected to serious physical abuse prior to death. As we held in Hance v. State, supra, torture as the term is used in Code Ann. § 27-2534.1(b)(7) occurs when the victim is subjected, as in this case, to serious physical abuse prior to death. A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind.

By any rational standard, the murder was outrageously or wantonly vile, horrible or inhuman. It was the execution style murder of an unarmed and wounded armed robbery victim. In this respect, this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. Hance v. State, supra; Godfrey v. Georgia, 48 U. S. LW 4541 (1980). The victim did not die instantaneously, but was subjected to a gunshot wound in order to force him to tell where the money was. Thereafter, he was subjected to multiple gunshot wounds which within themselves were not fatal until lying on the floor helpless he was executed with a single shot to the back of the head. The victim was not related to either the appellant or his co-defendant. He did not give any reason to assault him, nor was the victim subjecting them to any emotional trauma. The appellant and his co-defendant attempted to hide the crime. See Godfrey v. Georgia, supra. We find the evidence factually substantiates and supports the finding of the two statutory aggravating circumstances and the sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, supra.

11. The appellant asserts that the death penalty must be set aside because the trial court's instructions to the jury in the sentencing phase of the trial did not provide guidance in the interpretation of Code Ann. § 27-2534.1(b)(7), citing the

recent case of Godfrey v. Georgia, supra. While the trial court did not give a limited charge on § 27-2534.1(b)(7), we hold that a limited charge was not required under the facts of this case. Godfrey v. Georgia, supra, Hance v. State, supra; Cape v. State, supra.

12. We have thoroughly reviewed the instructions of the trial court during the sentencing phase of the trial and find the charge was not subject to the defects dealt with in Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1978), and Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1978).

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. The appellant under the evidence of this case actively participated in the robbery and murder of the victim. Two weapons were found, both of which had been fired and both the appellant and his co-defendant were shown to have recently fired a weapon. We find the following similar cases listed in the Appendix support the affirmance of the death penalty. Appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Judgment affirmed. All the Justices concur.

80-6375

No. 80-

RECEIVED
MAR 23 1981
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Supreme Court, U.S.
FILED
MAR 20 1981
Alexander L. Stevas, Clerk

VAN ROOSEVELT SOLOMON,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Van Roosevelt Solomon, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at the Georgia Diagnostic & Classification Center in Jackson, Georgia. Mr. Solomon's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

ATTORNEY FOR PETITIONER

80-6375

RECEIVED
MAR 23 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

VAN ROOSEVELT SOLOMON,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

No.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOHN CHARLES BOGER, being duly sworn, states:

1. I am an attorney for Van Roosevelt Solomon, the petitioner in the above-captioned action, and I make this affidavit in support of Mr. Solomon's motion for leave to proceed in forma pauperis. My representation of Mr. Solomon is without remuneration.

2. Mr. Solomon is presently in the custody of the State of Georgia and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Solomon by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Solomon is attached hereto.

3. Counsel was appointed to represent Mr. Solomon at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Solomon is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Solomon is entitled to redress in the action.

John Charles Boger

JOHN CHARLES BOGER

Sworn to before me

this 20th day of March, 1981

Gloria A. Jones

NOTARY PUBLIC

GLORIA A. JONES
Notary Public, State of New York
No. 24-7113060
Qualified in Kings County
Commission Expires March 30, 1982

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

VAN ROOSEVELT SOLOMON,	:
Petitioner,	:
-v.-	:
STATE OF GEORGIA,	:
Respondent.	:
	:

I, Van Roosevelt Solomon, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty, I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Cobb County, a trial court of the State of Georgia, of murder and was sentenced to death. I am being held at the Georgia Diagnostic & Classification Center in Jackson, Georgia. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

_____
VAN ROOSEVELT SOLOMON

STATE OF GEORGIA

COUNTY OF BUTTS

The foregoing affidavit of Van Roosevelt Solomon was subscribed and sworn to before me this ____ day of _____ 1981.

_____
NOTARY PUBLIC

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NO. 80-6375

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

VAN ROOSEVELT SOLOMON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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10/

QUESTIONS PRESENTED

1.

Whether the Supreme Court of Georgia properly determined that, under the facts of this case, a limiting charge was not required during the sentencing phase of Petitioner's trial concerning the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7).

2.

Whether the Supreme Court of Georgia properly held that Petitioner's sentence of death was not "excessive or disproportionate" to the penalty imposed in similar cases considering the crime and the defendant.

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PART ONE

STATEMENT OF THE CASE

Petitioner, Van Roosevelt Solomon, was convicted in the Superior Court of Cobb County of murder, following a jury trial on September 24 through 27, 1979. The Petitioner received the death sentence, as the jury found as aggravating circumstances that: (1) the offense of murder was committed while the Petitioner was engaged in the commission of another capital felony; armed robbery and (2) that the offense of murder was outrageously and wantonly vile, horrible, and inhuman in that it involved torture, depravity of mind and an aggravated battery to the victim.

Petitioner's motions for new trial were denied by order of the court on February 25, 1980. Petitioner filed a notice of appeal to the Supreme Court of Georgia on March 20, 1980.

On direct appeal to the Supreme Court of Georgia, the Supreme Court found Petitioner's allegations, including his allegation that a limiting charge should have been given to the jury concerning the aggravating circumstance contained in Ga. Code Ann. § 27-2534.1(b)(7), to be without merit. See Solomon v. State, 247 Ga. 27, 34 (1981). Although Petitioner did not specifically raise the issue now presented for this Court's review, i.e., that the infliction of the death penalty upon the Petitioner, absent a finding by the jury that the Petitioner himself has intended to take a life, violates the Eighth and Fourteenth Amendments to the Supreme Court of Georgia, the Supreme Court of Georgia in conducting its mandatory sentence review, found that Petitioner's sentence of death for murder was

not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the Petitioner. Solomon v. State, 247 Ga. 27, 34 (1981).

The evidence produced at trial in the Superior Court of Cobb County, Georgia showed the following:

The victim in this case, Roger Dennis Tackett, was manager of the Tenneco Self Service Station and Convenience Store on Delk Road in Cobb County, Georgia. He was shot to death during an aborted armed robbery by the Petitioner and co-indictee, Wilbur May. Mr. Tackett was discovered, dead from gunshot wounds, in the back room of a store, in the interim between Petitioner's initial arrest for burglary and his actual removal to the police station.

At approximately 1:45 a.m. on June 16, 1979, police officer Kendle drove a Ms. Jill Rhoda to the Tenneco station in order to use the public phone there. (T. 240). Ms. Rhoda had called the police department in an effort to recover her keys from the apartment of a friend and Officer Kendle had responded to her call at 1:24 a.m. at the Palisades Apartments. (T. 239). Officer Kendle met Ms. Rhoda in the parking lot of the apartment and she explained to him that her date had refused to give her the keys to her car and that as he had gone to his apartment, she had to have a girlfriend pick her up and take her home. (T. 239). Officer Kendle took Ms. Rhoda to the Collingwood Apartments where her car was located, but the keys were not there and she could not locate her date's apartment. (T. 239-240). Since she knew the telephone number of her date, Officer Kendle took Ms. Rhoda to a phone booth at the Tenneco station so that she could contact him. (T. 240). Ms. Rhoda corroborated Officer Kendle's explanation of the circumstances leading up to his arrival at the Tenneco station. (T. 219-222).

Ms. Rhoda got out of the car and went to the phone booth at the station. Officer Kendle noticed that Mr. Tackett's car, a green vehicle, was parked with the front door open. Due to the fact that it was approximately 2:00 a.m. and that Officer Kendle knew the store normally closed at 12:00 midnight, he walked over to the store and noticed a black male looking out from the storeroom door. Officer Kendle identified the man he observed at this door as Wilbur May. (T. 242). Officer Kendle entered the store through the unlocked front door and the male shut the door to the storeroom. At this point, Officer Kendle testified that he heard four pops; three quick ones, a pause and then the fourth, but he did not realize what had made the noises which he heard coming out of the storeroom. (T. 243). Officer Kendle drew his gun, yelling "police, come out," but received no response. At this point, both Officer Kendle and Ms. Rhoda testified that Ms. Rhoda came in and Kendle told her to get out. (T. 229, 230, 244).

Officer Kendel opened the door of the storeroom and found two black males, the Petitioner and May. (T. 244). Officer Kendle had the two men place their hands on top of their heads, walk out of the door and lie down on the floor. (T. 245). Officer Kendle inquired as to what they had been doing and Petitioner responded, "burglarizing." (T. 245).

After patting Petitioner and May down and handcuffing Mr. May, Officer Kendle frisked Petitioner. He had previously reported the two burglars. Officer Kendle placed Petitioner in the back seat of the car and noticed that Petitioner was wearing gloves. (T. 246). Officer Kendle then went inside the store and took Mr. May outside of the store. At this point, Mr. Woolard, a local

security guard, drove up to the store. (T. 247). Officer Kendle testified that he called the emergency code number which he found on the store window. He located Petitioner's van, at this point realizing that there might be someone else in the store. (T. 248). While Officer Kendle was on the radio, Mr. Woolard was talking with Mr. May. (T. 249). Having spotted the van, both Officer Kendle and Mr. Woolard realized that someone was in the back room of the store. (T. 249). Mr. Woolard later testified that Mr. May told him that there was a man hurt in the back room. (T. 295). Officer Kendle and Woolard then broke in the back door and discovered the body of Mr. Tackett. (T. 249-250). Officer Kendle testified that he found no pulse, but that Mr. Tackett's body was still warm and that there was a lot of blood around his head. (T. 250).

Officer Kendle testified that he had given Petitioner and Mr. May their Miranda rights while they were lying on the floor. (T. 252). Officer Kendle and Mr. Woolard discovered the body approximately thirty minutes after apprehending Petitioner and May. (T. 255). Two guns were also found at the scene of the murder, located next to the body of the victim. (T. 273). Officer Kendle testified that he did not touch these guns but left the crime scene undisturbed, while waiting on the detectives which he had previously called. (T. 273-274).

The testimony of Mr. Woolard was basically cumulative to that of Officer Kendle. (T. 281-282). Mr. Woolard also identified Mr. May and the Petitioner as being the two suspects who were discovered at the store at this time. Mr. Woolard testified that May admitted to him during a conversation at the scene that there was a man "hurt bad" in the storeroom. (T. 295). Mr. Woolard's testimony corroborated that of Officer Kendle as to their discovery of the van, the victim's body and the guns. (T. 295-309; 311).

Detective Robert Kelley testified as to his arrival at the crime scene in his investigation of the murder, including taking certain photographs and collecting evidence. (T. 329). His testimony corroborated that of Officer Kendle and Mr. Woolard and included photographs and diagrams of the scene which were admitted into evidence. (T. 31, 32, 334). Admitted into evidence were photographs of the guns, the victim and the cash drawer which was found in the cooler area of the back room of the convenience store. (T. 351-358). Detective Kelly identified the guns as being a Colt .35 caliber short which had been fired four times and a Smith and Wesson pistol which had also been fired. (T. 355-356).

Lieutenant Moss, who arrived at 1:30 a.m., corroborated Offider Kendle's testimony that the body of the victim was found in the storeroom of the convenience store. (T. 381). Lieutenant Moss investigated the van which was found near the Tenneco station and inventoried the contents of the van. Articles found in the van were introduced into evidence at Petitioner's trial. (T. 383-385). During the course of his inventory of the van, burglary tools, a holster and bullets were removed from the van, which was identified as being registered to the Petitioner. (T. 384-387).

Upon his arrival at the crime scene at approximately 3:00 a.m., Officer Julian Deal questioned the Petitioner. Officer Deal testified as having given Petitioner his Miranda rights and "swabbing his hands" to test for gunpowder residue. (T. 395). Officer Deal again advised the Petitioner of his Miranda rights once he arrived at the police station. At this point, Officer Deal testified that the Petitioner involutarily told him that he had been tied up and forced into the store, where he was put into the cooler while Mr. May shot the victim, Mr. Tackett. (T. 416-417).

Mr. Kelley took the swabs to the crime lab. (T. 422-423). At the crime lab, Mr. Fite examined the guns and the swabs and identified the guns which were found, as having been used in the crimes. Mr. Fite testified that the bullets were fired from the guns located near the body of the victim. (T. 428-429, 432). Mr. Riddell, the microanalyst at the State Crime Lab, testified as to gunshot residue tests which he performed on the swabs taken from the Petitioner and May. Chemicals were found on both the hand of the Petitioner and Mr. May that indicated that they had fired shots from the guns found at the scene of the crimes. (T. 444-446).

Chief Medical Examiner Doctor Burton testified as to the autopsy he performed on Mr. Tackett. (T. 452). He stated that his examination revealed five gunshot wounds; one wound in the head area, one located in the jaw, another located on the victim's right hip, a fourth located on the victim's right buttock and a fifth located on the victim's left thumb. (T. 456-457). Dr. Burton set out the progression of the wounds through an explanation of the position of the body, the angles at which the bullets had entered the body and the amount that the victim's blood had spattered. His examination revealed that three shots had been fired rather quickly, the first two to the hip, the final to the head of the victim as he was lying on the floor. Dr. Burton testified that the thumb wound had probably been inflicted at an earlier time. (T. 463-470). Therefore, five rounds had been fired into the victim's body. Officer Kelley had determined that the gun used by Mr. May had only been fired four times.

Petitioner Solomon took the stand in his own behalf only during the sentencing phase of the trial, and testified that he had met co-indictee Wilbur May in the first or second week of June, while working for a paint contractor on a house on Northside Drive. (T. 590-595). Petitioner testified that May worked under him on the job the day of their meeting and that when May told the Petitioner that he had no place to stay, Petitioner invited him to spend the night at his house. (T. 596). Petitioner testified that on June 16, the day of the crime, he worked all day and met Mr. May at his house later that day at approximately 7:00 or 8:00 p.m. Petitioner testified that he drove May to various locations where May discussed with various individuals his desire to obtain a gun. (T. 597-600). Petitioner testified that Mr. May obtained two weapons. Finally, Mr. May requested that Petitioner drive him to the Tenneco Station and Convenience Store and Petitioner testified that having let Mr. May out of his van, he pulled across the street from the station and went to sleep in the van. (T. 600).

According to Petitioner, he slept in the van approximately thirty to forty minutes, waking up when May returned to his truck and made him go into the Tenneco station with him. (T. 601). Petitioner testified that Mr. May took him and the victim, Mr. Tackett, into the back room and that May asked Mr. Tackett for money. (T. 601). Petitioner testified that he did not know what it was all about but that he observed Mr. May shot the victim and then he heard the police call out and ask them what they were doing in the back room and tell them that they were under arrest. (T. 601-602).

Petitioner could not explain on cross-examination how his own Smith and Wesson pistol came to be found in the Tenneco store. (T. 616). He stated that he did not tell police about Mr. Tackett lying bleeding in the back room of the store as he was in shock at the time. (T. 613). Although testifying that Mr. May forced him from the van and into the store at gunpoint, Petitioner admitted on cross-examination that he was not tied up at the time that Mr. May shot the victim and stated that he told this to the police because after the incident, ". . . I began to run over my mind that I got to think of something that is going to get out of this." (T. 616).

These facts will be referred to as is necessary for a more thorough illumination of any issue raised by means of this petition for a writ of certiorari.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY HELD THAT, UNDER THE FACTS OF THIS CASE, NO LIMITING CHARGE CONCERNING GA. CODE ANN. § 27-2534.1 (b)(7),WAS REQUIRED.

After Petitioner's conviction, a sentencing hearing was held in which various evidence was presented to the jury relative to the penalty which should be imposed pursuant to Petitioner's conviction for the offense of murder. (T. 572-623). The court charged the jury and defined the term "aggravating circumstances" in general. (T. 649-650). He charged on the two specific aggravating circumstances, i.e., those set forth in Ga. Code Ann. § 27-2534.1(b)(2), that the offense of murder was committed while the defendant was engaged in the commission of another capital felony, armed robbery, and Ga. Code Ann. § 27-2534.1(b)(7), that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind and an aggravated battery to the victim. (T. 650-651). He also furnished them with a written list of these aggravating circumstances which they were authorized to consider. (T. 651). However, the trial court, did not give further specific instructions on the aggravating circumstance contained in Ga. Code Ann. § 27-2534.1(b)(7). It is the contention of the Respondent, this Court has never determined that any such further "limiting" instruction is an essential requirement when this aggravating circumstances is used to authorize the imposition of the death penalty.[1/]

1/ A review of the record reveals no request for any such "limiting instruction" by Petitioner's trial counsel.

Considering this allegation on direct appeal, the Supreme Court of Georgia considered this allegation, i.e., that the trial court's instructions to the jury in the sentencing phase of the trial must provide guidance in interpreting Ga. Code Ann. § 27-2534.1(b)(7) under the authority of Godfrey v. Georgia, 446 U.S. 420 (1980). However, the Supreme Court of Georgia properly found that, "while the trial court did not give a limited charge on § 27-2534.1(b)(7), we hold that a limited charge was not required under the facts of this case. Godfrey v. Georgia, supra; Hance v. State, supra; Cape v. State, supra." Solomon v. State, 247 Ga. 27, 34 (1981). Respondent contends that this finding, was clearly authorized under this Court's decision in Godfrey v. Georgia, supra.

The question which was decided in Godfrey v. Georgia, supra, was whether the Supreme Court of Georgia could be said to have applied a constitutional construction of a portion of the language contained in the aggravating circumstance set forth in Ga. Code Ann. § 27-2534.1(b)(7). This Court found the death sentences in that case to be invalid because there was no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.

In determining whether or not the Supreme Court of Georgia had applied a constitutional construction of a portion of the language contained in the seventh aggravating circumstance under Georgia law, this Court took into consideration numerous factors, one of which was the type of instructions which had been given to the jury. The major factor which this Court considered in determining whether Godfrey's death sentences were valid, was

the review of the death sentence, imposed pursuant to this aggravating circumstance, solely, by the Supreme Court of Georgia. This Court held that more needed to be stated by the Supreme Court of Georgia as to the evidence supporting the jury's § (b)(7) finding, than that the verdict was "factually substantiating." The review by the Supreme Court of Georgia in the instant case, is clearly distinguishable from that which it made of the aggravating circumstance in Godfrey v. Georgia, supra.

The sentence review portion of the Supreme Court of Georgia's opinion dealing with the sufficiency of the evidence to support the seventh aggravating circumstance is found in Solomon v. State, 247 Ga. 27, 33 (1981). Having reiterated certain portions of the trial testimony, the Supreme Court of Georgia concluded that there was sufficient evidence to support this circumstance, by stating the following:

> "By any rational standard, the murder was outrageously or wantonly vile, horrible or inhuman. It was the execution-style murder of an unarmed and wounded arm robbery victim. In this respect, this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. Hance v. State, supra; Godfrey v. Georgia, 446 U.S. ___ (100 S.Ct. 1759) 64 L.Ed.2d 398 (1980). The victim did not die instantaneously, but was subjected to a gunshot wound in order to force him to tell where the money was. Thereafter, he was subjected to multiple gunshot wounds which within themselves were not fatal until lying on the floor helpless he was executed with a single shot to the back of the head. The victim was not

related to either the Appellant or his co-defendant. He did not give any reason to assault him, nor was the victim subjecting them to any emotional trauma. The Appellant and his co-defendant attempted to hide the crime. See Godfrey v. Georgia, supra. We find the evidence factually substantiates and supports the finding of the two statutory aggravating circumstances and the sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, supra."

After reviewing this evidence and making this finding, the Supreme Court of Georgia then went on to hold that no limited charge was required under the facts of this case. Thus, the instant case, is distinguishable from Godfrey v. Georgia, supra, in which a further instruction to the jury might have been a factor which this Court found prevented the death sentences from being rendered invalid. Again, the type of instruction given to the jury, is only one factor in determining whether or not the imposition of the death sentence based on the seventh aggravating circumstance, is proper.

Of course, the instant case is also distinguishable from Godfrey v. Georgia, supra, as has previously been noted, there were two statutory aggravating circumstances utilized to impose the death penalty in the instant case. Further, while the jury in Godfrey v. Georgia, supra, only found that the murder was "outrageously or wantonly vile, horrible or inhuman," the jury in the instant case found the entire statutory aggravating

circumstance as contained in Ga. Code Ann. § 27-2534.1(b)(7).

In the context of this case as a whole, the Supreme Court of Georgia properly found that no limiting charge was necessary in order to constitutionally impose a sentence of death in the instant case. Therefore, this Court should deny the petition for writ of certiorari as to this issue.

B. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT PETITIONER'S SENTENCE OF DEATH FOR MURDER WAS NOT EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES.

It should first be noted that Petitioner admits on page 8 of his brief that this allegation has never been directly raised in the lower court. It is well-settled that this Court will not decide federal constitutional issues raised in this Court for the first time on review of state court decisions. See Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). See also Moore v. Illinois, 408 U.S. 786 (1972). The Supreme Court of Georgia did of course make the mandatory sentence review under Georgia statutory provisions and concluded that the sentence of death for murder in the instant case was not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant. See Solomon v. State, 247 Ga. 27, 34 (1981). However, the Supreme Court of Georgia did not specifically consider Petitioner's claim that before there is infliction of the death penalty, there must be a finding by the jury that Petitioner has taken live, attempted to take life, or intended to take life. Petitioner

argues that his constitutional rights were violated because he was sentenced to die without an express finding that he engaged in the conduct with a conscious purpose of producing death. Essentially, Petitioner is asserting that the death penalty cannot be imposed in a "non-triggerman" situation. However, the Petitioner's argument assumes that the evidence produced at trial was consistent with the finding that he did not act as a triggerman in causing the death of the victim, Roger Dennis Tackett. In fact, there was evidence consistent with the fact that the Petitioner fired at least one of the shots which caused a gunshot wound to the victim. As previously noted, the medical examiner's testimony revealed that there were five gunshot wounds to the victim, one in the head area, one in the jaw, one in the right hip, one in the right buttock, and a fifth on the victim's left thumb. (T. 456-457). The gun utilized by Mr. May, the Petitioner's co-indictee, had only been fired four times. State's evidence also showed that gunshot residue tests, performed on the Petitioner and co-indictee May, indicated that both men had fired shots from the guns found at the scene of the crimes. (T. 444-446). Two guns had been found at the scene of the murder, located next to the body of the victim, one of them being the Petitioner's Smith and Wesson. (T. 273). Therefore, the instant case presents not a "non-triggerman" situation, but rather equal participation by the Petitioner and his co-indictee as to the armed robbery and the murder, with the only question being which of the five gunshot wounds actually caused the death of the victim.

It can also be argued that the jury was authorized, under the evidence presented at trial, to believe that the Petitioner was the "prime mover," even in light of his testimony that he acted on May's instructions. As the prosecuting attorney stated

in closing argument, "Van Solomon has got to be the man who knew what was going on and was in control. His van, his burglary tools, his gun. Never said a word about, first, speak up to the police." (T. 540).

The trial court recognized Petitioner's defense of "coercion" by his co-indictee and charged the jury on this contention. (T. 557). However, the jury was properly charged that, "no one who delivers a fatal wound resulting in a homicide is excused from the commission of such murder by a contention that he was coerced. However, one is not guilty of murder if he did not deliver the fatal blow, but aided and abetted the slayer only because of a reasonable or present and immediate fear of death or great violence to himself. (T. 557-558).

Therefore, the question was squarely presented to the jury and the jury, in convicting the Petitioner of murder, clearly believed on the evidence presented at trial, that the Petitioner had not been coerced, and that he had directly participated in the armed robbery and that his acts, together with those of Mr. May, had directly led to the victim's death. Therefore, even if Petitioner's premise is accepted for the sake of argument, this is a case in which the Petitioner himself is implicated in the murder and is not a case in which the death penalty is imposed for a "non-triggerman."

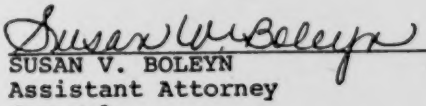
In any event, Coker v. Georgia, 433 U.S. 584, 598 (1977), cited by the Petitioner, merely stands for the proposition, that the death penalty should not be imposed for the offense of rape, as long as the rapist does not himself take the life of his victim. Coker v. Georgia, supra, does not support Petitioner's argument, that it is only when a person has taken the life, attempted to take life, or intended to take life, that the death

penalty can be imposed upon him. Simply stated, Coker v. Georgia, supra, does not deal with the "non-triggerman" type situation. As Petitioner has noted, the full court has not dealt with this issue or taken Coker v. Georgia, supra to this extent, except for perhaps Justice White in his concurring opinion in Lockett v. Ohio, 438 U.S. 586, 627-68. The Respondent respectfully submits that should this Court ever reach this question, it should not be in this case, as this case does not present the classic "non-triggerman" situation, but rather is a situation in which the Petitioner directly participated in the armed robbery and the murder of the victim. Therefore, this Court should decline to grant a petition for writ of certiorari to reach a question not raised in the instant case and raised for the first time before this Court.

CONCLUSION

For all of the above and foregoing reasons, the petition for a writ of certiorari should be denied.

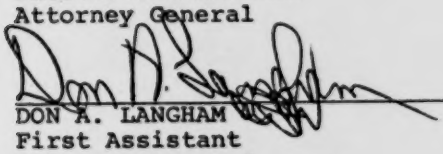
Respectfully submitted,



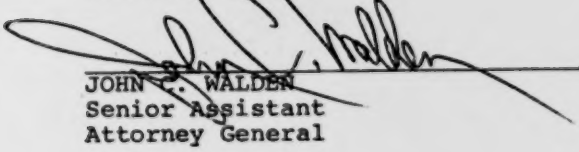
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